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No. 90-215

In The

Supreme Court of the United States

October Term, 1990

GRADY MICHAEL STROMAN,

Petitioner,

vs.

WEST COAST GROCERY COMPANY,
A Washington corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a Circuit Court of Appeals may conclude that a release, containing a waiver of all legal claims, including Title VII claims, was voluntarily and knowingly executed, based on a review of the record as a whole, where the trial court failed to make factual findings on the issue.

LIST OF INTERESTED PARTIES

1. Grady Michael Stroman, Petitioner.

2. West Coast Grocery Company, a Washington corporation, Respondent.

3. West Coast Grocery Company, a division of SuperValu Stores, Inc., a Delaware corporation, successor to West Coast Grocery Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING WRIT	5
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver, Co., 415 U.S. 36 (1974) 6

Brown v. Sierra Nevada Hospital, 849 F.2d 1186 (9th Cir. 1988) 9

Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987) *cert. denied*, 484 U.S. 1047 (1988) ..4, 10

Coventry v. United States Steel Corp., 856 F.2d 514 (3rd Cir. 1988).....6, 7

DeMedina v. Reinhardt, 686 F.2d 997 (D.C. Cir. 1982)..... 8

EEOC v. American Express Publishing Corp., 681 F. Supp. 216 (S.D.N.Y. 1988)..... 7

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)..... 6

Jones v. Tabor, 648 F.2d 1201 (9th Cir. 1981)..... 7

Miranda v. Arizona, 384 U.S. 436 (1966)..... 7

Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984)..... 6

Pritchett v. Kimberling Cove, Inc., 568 F.2d 570 (8th Cir. 1977) *cert. denied*, 436 U.S. 922 (1978)..... 8

Pullman-Standard v. Swint, 456 U.S. 273 (1982)..... 8

Rogers v. General Electric Corp., 781 F.2d 452 (5th Cir. 1986) 6

TABLE OF AUTHORITIES – Continued

Page

Rothenberg v. Security Management Co., Inc., 736 F.2d 1470 (11th Cir. 1984) 8

Sampson v. Murray, 415 U.S. 61 (1974) 8

Sangster v. United Airlines, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981) 10

Shull v. Dain, Kalman & Quail, Inc., 561 F.2d 152 (8th Cir. 1977) *cert. denied*, 434 U.S. 1086 (1978) 6

Watson v. Nationwide Ins. Co., 823 F.2d 360 (9th Cir. 1987) 10

STATUTES

28 U.S.C. §1331 1

42 U.S C. §2000(e) 1

Fed. R. Civ. P. 52(a) 5, 6

Supreme Court Rule 10 ..... 5, 9

JURISDICTION

Petitioner originally brought suit in the United States District Court of the Western District of Washington at Tacoma, alleging violations of 42 U.S.C. §2000(e) *et seq.* Jurisdiction was proper in the district court under 28 U.S.C. §1331.

Trial was held before the court without a jury on March 21, 1988. After a three day trial, the court granted judgment for the petitioner in the amount of $101,378.48 for back pay and $190,073.40 for five years front pay, plus reasonable attorneys' fees. Judgment was entered on April 20, 1988 for $291,445.88.

Respondent timely appealed to the Ninth Circuit Court of Appeals. On August 31, 1989, the Ninth Circuit issued an opinion reversing the trial court's decision and entering judgment for respondent. Petitioner filed a petition for rehearing and a suggestion for rehearing *en banc*. Two members of the three judge panel voted to deny the petition for rehearing and to reject the suggestion for rehearing *en banc*. The full court was advised of the suggestion for an *en banc* hearing and no judge of the court requested a vote on it. *See* Petitioner's Appendix 1(g). The order denying the petition for rehearing and suggestion for rehearing *en banc* was entered on March 6, 1990.

Petitioner served upon respondent its Petition for Writ of Certiorari on June 4, 1990. Petitioner's corrected petition was filed on August 2, 1990.

STATUTES AND RULES INVOLVED

Respondent believes there are no statutes or rules which require interpretation.

STATEMENT OF THE CASE

Petitioner was hired by respondent as a part-time order selector on January 15, 1981 and began work on a full-time basis on September 28, 1981. Petitioner's job as an order selector consisted of identifying pallets of groceries in respondent's warehouse and transporting the pallets to different shipping locations throughout the warehouse. The work of the order selectors is evaluated according to objective production standards based on the number of orders picked during each two week production period.

Beginning in 1982, petitioner made requests to be trained for a position as grocery warehouse supervisor in the scheduling office. An employee generally had to be recommended by a supervisor for training in the scheduling office. During petitioner's tenure of employment, petitioner was repeatedly counseled by both minority and non-minority supervisors for poor productivity for which he received numerous policy consultations and written warnings. In light of petitioner's consistently marginal performance record, petitioner's supervisors declined to recommend him for training.

In April, 1985, petitioner applied for, and was interviewed for, a supervisory position in the scheduling office. He was not selected. As a result of his failure to

obtain the position, petitioner filed a discrimination charge with the Washington State Human Rights Commission and with the Equal Employment Opportunity Commission, alleging that he was denied the position because of his race. On June 12, 1985, petitioner filed a second discrimination charge alleging retaliation because of the previous charge. In July, 1985, petitioner again applied for a supervisory position, but was not selected.

Petitioner sought and obtained a voluntary medical leave of absence on August 5, 1985. In late October, 1985, petitioner approached his supervisor, Willie Mosley, regarding the possibility of being put on economic layoff so that he could receive unemployment benefits. Although the economic layoff was intended only for part-time employees, respondent agreed to place petitioner on economic layoff status. Petitioner would not otherwise have been eligible. After further negotiation, Mr. Stroman and West Coast signed the following agreement:

West Coast Grocery and Grady Michael Stroman agree to the following:

1. Mike will leave the Company on an economic layoff.
2. West Coast will not contest the unemployment benefits.
3. The employee's record will be cleared and information given out limited to date of hire, rate of pay, and journeyman status.
4. The employee will have no recall rights.
5. The employee will be entitled to any accrued vacation and his share of Profit Sharing payable as defined by Federal Law, and the terms of the Profit Sharing Trust.

6. These terms represent a full and final settlement of any and all claims arising out of Mike's employment with West Coast Grocery.

The agreement dated November 1, 1985, was signed by Petitioner, Mosley and David Hamlin, the Operations Manager for West Coast.

On December 2, 1985, petitioner filed a third discrimination charge alleging that respondent failed to promote petitioner to the July, 1985 supervisor position because of his race. Petitioner initiated the underlying lawsuit on July 31, 1986 alleging that he was denied training and promotion because of his race. He also stated a claim for retaliation and constructive discharge. Respondent sought summary judgment on the release prior to trial. The motion was denied without opinion by the trial court.

During trial, the district court found that the November 1, 1985 agreement was a "termination of work" agreement and not a release of claims against West Coast. Relying upon the Ninth Circuit decision in *Cassino v. Reichhold Chemicals Inc.*, 817 F.2d 1338, 1342-43 (9th Cir. 1987), *cert denied*, 484 U.S. 1047 (1988), the trial court ruled that the agreement was admissible only to show discriminatory intent.

The district court further held that respondent's decision not to train petitioner was racially motivated and that petitioner was constructively discharged because of the actions and conduct of the respondent. The court awarded petitioner $101,372.48 in back pay and $190,073.40, representing five years of front pay "due to corporate hostility."

The respondent, West Coast Grocery Company, appealed from the trial court's decision and set forth six separate issues for appeal. The Ninth Circuit Court of Appeals ruled in a unanimous decision that, as a matter of law, the release was sufficient to cover any Title VII claims and that the trial court's ruling to the contrary was erroneous. The Ninth Circuit did not decide any of the other issues raised by respondent. The majority of the panel further held that, based on the record as a whole, there was sufficient evidence from which to conclude that the release executed by the petitioner was done so knowingly and voluntarily.

REASONS FOR DENYING THE WRIT

Petitioner has characterized the Court of Appeal's decision in this case as in conflict with decisions of other circuits and of this Court and as having so departed from the accepted standards of judicial proceedings as to call for the exercise of this court's power of supervision. Supreme Court Rule 10(a). To the contrary, the Ninth Circuit Court of Appeals decision was well within the court's appellate authority, does not conflict with other circuit decisions, and does not rise to the level of importance or of public significance sufficient to justify acceptance of a petition for writ of certiorari.

Petitioner bases his argument for review on what he perceives to be a violation of Fed. R. Civ. P. 52(a) by the Ninth Circuit Court of Appeals decision which declined to remand for further factual hearing on the issue of the

Title VII release. Petitioner misreads the requirements of Fed. R. Civ. P. 52(a) under the circumstances of this case.

Fed. R. Civ. P. 52 requires only that a reviewing court invoke a "clearly erroneous standard" when reviewing factual findings by the trial court, giving due weight to the trial court's ability to evaluate the demeanor and credibility of the witnesses. *See, e.g., Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 337 (5th Cir. 1984); *Henson v. City of Dundee*, 682 F.2d 897, 906 (11th Cir. 1982); *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied* 434 U.S. 1086 (1978). Where there are no factual findings, however, and where the court relied upon a erroneous standard of law, rule 52 simply does not apply.

Here, the trial court made no factual findings concerning the release. Rather, the trial court relied on an erroneous standard of law to conclude that the release had no relevance in the case. The Ninth Circuit decision properly overruled the trial court on this mistaken issue of law.[1] Once the Ninth Circuit concluded that the release, on its face, was sufficient to waive Title VII claims, the only question for the court was whether the release was knowing and voluntary as required by *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 52 & n.15 (1974).

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[1] Petitioner does not argue that the Ninth Circuit erred in ruling that the release was legally sufficient to waive Title VII claims. Indeed, the Ninth Circuit decision is consistent with those of other circuits. *See, e.g., Coventry v. United States Steel Corp.*, 856 F.2d 514, 522-23 (3rd Cir. 1988); *Rogers v. General Electric Corp.*, 781 F.2d 452, 455-56 (5th Cir. 1986).

The majority of the panel, after reviewing the record as a whole, concluded that petitioner knowingly and voluntarily executed the release and that remand would not serve any purpose.

The only issue presented by the petition for writ of certiorari is whether the Ninth Circuit erred in failing to remand for new findings to be made in light of the correct rule of law and whether a failure to remand warrants review by the Supreme Court.

The Ninth Circuit found, that based on the record as a whole, the unambiguous language of the release, and, significantly the petitioner's own testimony, together with the petitioner's age, educational background, work and life experience, were sufficient to establish a knowing waiver.[2] *See Coventry v. United States Steel Corp.*, 856 F.2d 514, 523 (3rd. Cir. 1988) (quoting *EEOC v. American Express Publishing Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988)). The Circuit Court further found that, given the education and experience factors described above, the passage of time between the presentation of the agreement and the signature by petitioner, and especially the fact that it was petitioner who initiated and sought the agreement, there was evidence of a non-coercive atmosphere sufficient to conclude that the waiver was also voluntary. *See Jones v. Taber*, 648 F.2d 1201, 1203-05 (9th

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[2] Petitioner's citation to *Miranda v. Arizona*, 384 U.S. 436 (1966), on this point is certainly curious. *Miranda*, which deemed a police custody setting inherently coercive and thus so potentially harmful to Fifth Amendment and other Constitutional rights that a mechanical warning rule was warranted, certainly bears no relationship to this case factually, legally or analytically.

Cir. 1981). The Ninth Circuit also noted, in a review of the entire record, that although neither party had the benefit of legal counsel, petitioner had sufficient time to consult counsel and had previously filed two discrimination complaints, thereby indicating his knowledge of Title VII rights. Moreover, there was absolutely no evidence or inference that the release was presented or signed in a coercive atmosphere.[3]

Under all of these circumstances, which were apparent from the existing record, the Ninth Circuit Court of Appeals concluded that remand was not necessary and that there were sufficient facts from which to conclude that petitioner waived his Title VII rights knowingly and voluntarily. An appellate court may reverse or affirm even in the absence of trial court findings where the record is sufficient for a full understanding of the merits of the case. *See Sampson v. Murray*, 415 U.S. 61 (1974); *Rothenberg v. Security Management Co., Inc.*, 736 F.2d 1470, 1472 (11th Cir. 1984); *De Medina v. Reinhardt*, 686 F.2d 997, 1012 (D.C. Cir. 1982); *Pritchett v. Kimberling Cove, Inc.*, 568 F.2d 570, 576 n.11 (8th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

The rule set forth in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), is consistent with the circuit court's determination. An appellate court may determine factual

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[3] Petitioner has clearly misstated the decision of the Ninth Circuit when he asserts:

> The second determination [that the release was knowing and voluntary] was based solely on the Mosley affidavit.

Petition for Writ of Certiorari, p. 6.

issues in the absence of trial court findings where the record is sufficiently clear so as to permit only one resolution of the factual issue. 456 U.S. at 292. The Ninth Circuit decision reflects the belief of the majority of the panel that the record was sufficiently clear to resolve the factual issues. There is no reason to second-guess that determination.

For several additional reasons, review is not warranted. Petitioner has not met the standards for granting a writ required by Supreme Court Rule 10. The Court of Appeals' decision truly affects only the parties to this litigation. The decision below was based on the record before that court and based solely on the facts of this particular case. Acceptance of review here would constitute essentially another level of appellate review of the same set of facts with no real precedential implication for any other litigation.

Moreover, while the Court of Appeals reached its decision solely on the release executed by the petitioner, respondent had raised several other issues on appeal which were not addressed by the Ninth Circuit decision for which review is sought here.

Specifically, respondent argued that the trial court's conclusion that an employee's job performance has no relevance to the employee's qualifications to be trained for supervisor was clearly erroneous. *Cf. Brown v. Sierra Nevada Hospital*, 849 F.2d 1186 (9th Cir. 1988) (job performance was factor supporting trial court's finding). Respondent also assigned error to the trial court's conclusion that plaintiff was constructively discharged from employment. Petitioner had voluntarily left employment,

believing he had another job lined up outside the state, thereby failing to meet the requisite standard for constructive discharge. *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (standard is "intolerable and discriminatory" treatment). Additionally, respondent assigned error to the trial court's refusal to allow cross-examination of the petitioner on the issue of petitioner's efforts to mitigate damages and to the trial court's award of front pay in this context. *See Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1345-47 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988). *See also Sangster v. United Airlines*, 633 F.2d 864, 867-68 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981).

Reversal of the trial court's decision was mandated by any one of these theories. The Ninth Circuit found that it was not necessary to address these issues as the release executed by petitioner was sufficient to dismiss all claims. In short, acceptance of review here will not facilitate or alter the resolution of this case. Most importantly, there is no sense that justice has not been done here or that further review will fashion a different, better result in this or any other case.

CONCLUSION

This is not a case in which the Court of Appeals has departed from accepted standards of judicial proceedings requiring the exercise of this Court's power of supervision. The Court of Appeals reviewed the record fully and based its decision on that record as a whole. The court's

decision is consistent with existing law. Under these circumstances, there is no value – immediate or precedential – that would come from Supreme Court review.

For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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